BANK PERTANIAN MALAYSIA

v.

BLUE VALLEY PLANTATION BHD & ORS

HIGH COURT MALAYA, KUANTAN
RAMLY ALI J
[ORIGINATING SUMMONS NO: 24-133-1999]
2 MAY 2002

LAND LAW: *Charge - Order for sale - "Cause to the contrary" - Charge in respect of undivided portion of land - Form 16A amended to give appearance of validity to charge - Amendment effected without consent or knowledge of chargor and occupiers - Whether amounted to fraud, dishonesty and misrepresentation - Whether charge invalid - Non-disclosure of occupiers' interest in land - Whether fatal - Whether there was 'cause to the contrary' - National Land Code ss. 256, 340(2) - Rules of High Court 1980, O. 83 r. 3*

LAND LAW: *Charge - Order for sale - Vacant possession - Portions of land occupied by bona fide purchasers - Interest of occupiers not disclosed - Whether there was misrepresentation - Rules of High Court 1980, O. 83 rr. 3 & 4 - Whether complied with - Chargee's title to land - Whether defeasible - National Land Code, ss. 256, 340(2) - Rules of High Court 1980, O. 83 rr. 3 & 4*

The first defendant is the registered proprietor of a piece of land measuring 508.875 acres in Cameron Highland ('the land'). In 1992 and 1993, portions of the land were sold by the first defendant to the interveners and the interveners had since occupied their respective portions of the land. It was not in dispute that by the sale, the first defendant's interest in the land had been reduced from 508.875 acres to 300 acres.

In 1995, one Jute Industries Sdn Bhd ('the Borrower') purchased the first defendant's portion of the land, and for that, obtained a RM15 million loan from the plaintiff which was secured upon a third party charge over the first defendant's portion of the land. The plaintiff, however, could not validly register the charge since the land was yet to be sub-divided. Undeterred, the plaintiff proceeded to seek the interveners' consent to the charge, and in return undertook to exempt the interveners' portions of the land from any future foreclosure proceeding. Having obtained the consent, the plaintiff's solicitors prepared the charge document in Form 16A and had the same executed by the first defendant as chargor.

The said Form 16A stated that only 300/508.875 acres of the land was to be charged. However, upon submitting the Form for registration at the Land Office, the solicitors, without the consent or knowledge of the chargor, or the interveners, deleted the figure "300/508.875" in the Schedule to the Form, and substituted it with the word "semua", indicating thereby that the charge was in respect of the entire land. Hence, a third party charge over the entire land had been registered in favour of the plaintiff.

The Borrower defaulted and the plaintiff initiated foreclosure proceeding against the land under s. 256 National Land Code ('NLC'). Before the learned judge, the chargor and the interveners argued that the proceeding was unsustainable, as the plaintiff, through its solicitors, had committed fraud, dishonesty and misrepresentation in their effort to get the third party charge created by the chargor. The primary issue that arose was whether, on the facts and in the circumstances, there existed 'cause to the contrary' as to prevent the court from making the order for sale sought for.

Held:

[1] Under s. 256(3) NLC, the onus is on the chargor or the interveners to show the existence of 'cause to the contrary'. In doing so the chargor or the interveners may prove that the chargee himself is not free of fault and that he was guilty of unreasonable conduct. (p 109 d)

[2] The solicitors' duty here is to ensure that the charge documents were properly and correctly filed and signed by both the chargor and chargee. Such duties as conferred upon him did not include the power to make amendments to the documents which might affect the interest of the parties without having obtained the necessary consent from the parties concerned. (p 113 b-c)

[3] The solicitors knew that the interveners were in actual possession of the respective portions of the land, that the first defendant did not beneficially own the entire land, that the plaintiff's interest in the land was confined only to 300 acres, and that a charge on an undivided portion of the land is prohibited under s. 241 NLC. This notwithstanding, they proceeded to convince the interveners to consent to the creation of a third party charge over the entire land. They also prepared the relevant Form 16A stating that the land to be charged was only '300/508.875 acres, and got the form duly executed by the first defendant. Yet, on the next day, when the charge documents were presented at the Land Office, Kuantan, they made the vital amendment without the prior knowledge and consent of the chargor and

the interveners. These series of transactions amounted to fraud, dishonesty and misrepresentation on the part of the plaintiff through their solicitors. The fact that the plaintiff has filed the present application for an order for sale in respect of the entire land, and not disclosing therein the interest of the interveners, could only confirm the fraud, dishonesty and misrepresentation. (pp 112 a-c, 112 f & 113 g-h)

[4] While the title or interest of a registered proprietor, including that of a chargee, is indefeasible under s. 340(1) NLC, such title or interest shall not be indefeasible in a case of actual fraud or misrepresentation, by reason of ss. 340(2) & 340(2)(a) NLC respectively. The charge document here, namely the Form 16A, had been registered and created by way of fraud and fraudulent misrepresentation. It is thus a void document by virtue of s. 340(2)(b) NLC. (p 114 a-b)

[5] The court may invoke the aid of equity in order to satisfy whether cause to the contrary has been shown. A chargee, hence, must not only come to court with proof that the chargor has defaulted, but must come with clean hands and must disclose all material facts in his application. There must also be proof that the right of innocent third parties are not to be affected by the order for sale. (p 119 b)

[6] The plaintiff as chargee has failed to disclose all the material facts in their application. Indeed, the plaintiff is guilty of not only concealing material facts but also of fraudulently and dishonestly misrepresenting the facts to this court. And consequently, a completely different and 'innocent' factual matrix was presented to this court to obtain the order for sale in question. (p 119 f-g)

[7] The plaintiff must comply with O. 83 r. 3 Rules of the High Court 1980, since it was also claiming for vacant possession. By O. 83 r. 3(3) of the Rules, the plaintiff must show the circumstances under which the right to possession arises, and by O. 83 r. 3(4) the plaintiff must give particulars of every person who is in possession of the property. The plaintiff has clearly failed to comply with these provisions. Such failure strikes at the substance of the matters to be considered by the court. The plaintiff's application could be dismissed on this ground alone. (pp 120 a & c-e)

[8] The 1st defendant at the time of the creation of the charge was a mere bare trustee and not the actual beneficial owner of the portions of the land purchased by the interveners. The first defendant, therefore, could not charge the whole entire land in favour of the plaintiff, with the result that the charge herein was unlawful and invalid. The first defendant and the

interveners, in the circumstances, had raised numerous causes to the contrary as would defeat the plaintiff's application for an order for sale of the land. (pp 121 d & 122 a-d)

[Application dismissed.]

Case(s) referred to:

Adorna Properties Sdn Bhd v. Boonsom Boonyanit [2001] 2 CLJ 133 FC ***(foll)***
Assets Company Ltd v. Mere Roilmi [1905] AC 176 ***(refd)***
Chin Cheng Hong v. Hameed & Ors [1954] MLJ 169 ***(refd)***
Datuk Jaginder Singh & Ors v. Tara Rajaratnam [1983] 2 MLJ 196 ***(refd)***
Haroon Guriaman v. Nik Mah Nik Mat & Anor [1951] MLJ 209 ***(refd)***
Kandiah Peter Kandiah v. Public Bank Bhd [1993] 4 CLJ 332 SC ***(refd)***
Kheng Soon Finance Bhd v. MK Retnam Holding Sdn Bhd [1983] 2 MLJ 384 ***(foll)***
Loke Yew v. Port Swettenham Rubber Co Ltd [1913] AC 491 ***(refd)***
Low Lee Lian v. Ban Hin Lee Bank Bhd [1997] 2 CLJ 36 FC ***(refd)***
Overseas Chinese Banking Corporation Ltd v. Lee Tan Hwa & Anor [1989] 1 CLJ 458; [1989] 2 CLJ (Rep) 198 HC ***(refd)***
Overseas Union Bank Ltd v. Lee Guat Cheow & Co Sdn Bhd [1987] 1 MLJ 51 ***(foll)***
PJTV Denson (M) Sdn Bhd & Ors v. Roxy (Malaysia) Sdn Bhd [1980] 2 MLJ 136 ***(refd)***
Public Finance Bhd v. Hock Seng Housing Development [1991] 3 CLJ 2210; [1991] 3 CLJ (Rep) 496 HC ***(foll)***
Public Finance Bhd v. Narayanasamy [1971] 2 MLJ 32 ***(refd)***
Tai Lee Finance Co Sdn Bhd v. Official Assignee & Ors [1983] 1 CLJ 183; [1983] CLJ (Rep) 387 FC ***(refd)***
Temenggong Securities Ltd & Anor v. Registrar of Titles, Johore & Ors [1974] 2 MLJ 45 ***(refd)***
Wu Shu Chen & Anor v. Raja Zainal Abidin Raja Hussin [1997] 3 CLJ 854 CA ***(refd)***

Legislation referred to:

National Land Code, ss. 241(1), 256(3), 340(1), (2)(a), (b)
Rules of the High Court 1980, O. 83 r. 3(3), (4)

Other source(s) referred to:

The Torrens System in Malaya, SK Das, p 327

For the plaintiff - Sreether Sundaram (Jaya Ramachandran); M/s Balendran Chong & Bodi
For the 1st defendant - LA Gomez; M/s LA Gomez, Meor Shaazizi & Assoc
For the 2nd, 3rd & 4th defendants - Gurbachan Singh; M/s Bachan & Kartar
For the 5th defendant - Shivder Singh; M/s Mariadass Lock & Ainuddin
For the 6th defendant - G Balasunderam; M/s SC Thai & Bala & Assoc

Reported by WA Sharif

JUDGMENT

Ramly Ali J:

This is a foreclosure proceeding filed by the plaintiff against the 1st defendant for an order for sale of a property known as CT 1242 Lot 19, 30, 31 and 33 Mukim Ulu Telom, Cameron Highland, Pahang Darul Makmur. The said property is a subject matter of a 3rd party charge created by the 1st defendant on 26 December 1995, in favour of the plaintiff in respect of a loan facility of RM15,000,000 granted by the plaintiff to a 3rd party borrower (Jute Industries). The purpose of the loan is to finance the purchase of 300 acres of the said property by the borrower (Jute Industries) from the 1st defendant. The total size of the said land is 508.875 acres. The 1st defendant was and still is the registered proprietor of the entire undivided portion of the said land. The said 3rd party charge was to serve the plaintiff's interest in 300 acres of the said land, while the remaining portion of the said land (ie, 208 acres) was sold to various 3rd parties who are interveners in this proceeding. All the interveners are being cited as 2nd-6th defendants in the present proceeding. All the interveners particularly defendants 2, 3, 4 and 6, have purchased their respective portions of the land long prior to the creation of the 3rd party charge in favour of the plaintiff and they were already in occupation of their portion before the said charge was created. The entire land was used for tea plantation.

Factual Background Of The Case

One 3rd party, Jute Industries Sdn. Bhd., was granted a loan facility of RM15,000,000 by the plaintiff for the purpose of financing the purchase of 300 acres of the said land which was then registered under the 1st defendant's name. A letter of offer was issued by the plaintiff on 21 December 1995 and subsequently followed by a loan agreement signed on 26 January 1995. According to the plaintiff's affidavit in support of the application for sale of the said property (encl. 4 para. 4(1), the said loan was subject to the following securities:

(i) a charge on the land; and

(ii) guarantees by one Mala a/p K.N.K. Nair and Ibrahim bin Ali.

For that purpose, the 1st defendant has created a 3rd party charge in respect of the said land on 26 December 1995 in favour of the plaintiff and the said charge was duly registered on 27 December 1995 *vide* Gadaian Perserahan No. 8073/95 Jilid 391 Folio 33. The loan was fully disbursed in accordance with the loan agreement. As of 31 July 1999 the plaintiff claimed the borrower (Jute Industries) has defaulted in its repayment of the loan and was in arrears of RM22,266,361.68 (includes accumulated interest). On 15 September 1999, the

plaintiff filed the present foreclosure proceeding (encl. 2). All the cause papers were duly served on the 1st defendant who was the only defendant cited in the proceeding initially.

Subsequent to that, all the interveners, who were already in actual possession in respect of their respective portions in the said land, filed their respective applications to intervene supported by their respective affidavits in support. The plaintiff did not object to all the applications and thus on 15 January 2001, an order by consent was granted whereby all the present interveners were allowed to intervene and be cited as defendants.

Interveners' Interest

The first intervener (cited as 2nd defendant in this proceeding) is Bloom Springs Sdn. Bhd. This intervener claimed to have purchased 37.18 acres of the said land in question from the 1st defendant *vide* a sale and purchase agreement dated 12 October 1993. All the purchase price has been fully settled and this intervener has been in actual occupation of its portion of the land since 1993.

The second intervener (cited as 3rd defendant in this proceeding) are three individuals namely: Teong Peck Meng, Teong Peak Sing and Teong Pick Ching. They claimed to have purchased 12.81 acres of the said land from the 1st defendant *vide* a sale and purchase agreement dated 20 October 1993. All the purchase price has been fully settled and they were in actual possession of their portion since 1993.

The 4th interveners (cited as 5th defendant in this proceeding) are 23 individuals led by one Ramasamy a/l Panilipan (and 22 others). They claimed to have purchased 62 acres of the said land *vide* an agreement between the 1st defendants and all the 23 interveners as a result of a winding-up proceedings against the 1st defendant initiated by all the 23 interveners and as directed by the court *vide* court order dated 18 October 1996. Again all these interveners have also claimed that they were in actual possession of their portion of the land since that date.

The fifth intervener (cited as 6th defendant in this proceeding) is a company known as Deng Seng Enterprise Sdn. Bhd. This intervener claimed to have purchased 100 acres of the said land from the 1st defendant *vide* a sale and purchase agreement dated 5 October 1992. The purchase price has been fully settled and the intervener was already in actual possession of its portion of the land since 1992.

All the interveners claimed that their respective interest in the said land would be adversely affected if the plaintiff's application in the present foreclosure proceeding is granted.

Affidavits Of The Parties

The plaintiff's application for an order for sale of the said property (encl. 2) is supported by an affidavit in support sworn by one Avtaar Singh a/l Bhag Singh dated 16 September 1999 (encl. 4). The 1st defendant filed its affidavit-in-reply *vide* encl. 25. All the interveners have filed their respective affidavits in support of their applications to intervene between 8 August 2000 to 23 October 2000. The plaintiff did not contest their applications. Consent order was granted by the court on 15 January 2001.

On 20 February 2002, when the case came up for hearing, the plaintiff's counsel applied to the court for leave to reply to all the interveners' affidavits in support of their applications to intervene which were filed 1 1/2 years ago and for which consent order had already been granted on 15 January 2001. Since the relevant affidavits by the interveners were filed 1 1/2 years ago and the plaintiff did not contest their applications and since consent order has already been granted on 15 January 2001 the court disallowed the plaintiff's application to reply to all those affidavits. If the plaintiff feels that it should file its reply to all those affidavits, they should in the first place, have contested the interveners' application and filed its affidavit-in-reply within the stipulated 14 days period. Now, after a lapse of 1 1/2 years, the court is of the view that "it was too late for the plaintiff to do so".

It was also brought to the court's attention, when the case came up for hearing on 20 February 2002, that the 1st defendant has filed in another fresh affidavit on 18 February 2002, to incorporate some notes of proceedings in respect of another case relating to the same land *vide* Mahkamah Tinggi Malaya di Ipoh, Saman Pemula No. 24-448-2000. The plaintiff was granted leave to reply to this particular affidavit within the 14 days period provided under the Rules of the High Court 1980 (RHC).

Matters In Dispute

All the interveners as well as the 1st defendant are contesting the plaintiff's application in this proceeding. In their respective affidavits, they contended that they have raised "causes to the contrary" and as such the court should not make an order for sale of the said land under s. 256 of the National Land Code (NLC), as applied by the plaintiff. The common grounds for the contention are that the charge itself is invalid as it was not properly created and the present foreclosure proceeding is unsustainable. The grounds for such contention are as follows:

(i) the plaintiff's interest in the said land is only confined to a portion of 300 acres out of the whole 508.875 acres, but the order for sale as applied by the plaintiff in the present proceeding covers the whole of the said land;

(ii) that the interveners were *bona fide* purchasers of their respective portions of the land and were in actual possession of the portions even before the plaintiff's charge was created; and the plaintiff's agent duly aware of this fact before they agreed to disburse the loan and before the charge was created;

(iii) at the time when the charge was created, 208.875 acres of the land was not beneficially owned by the 1st defendant (the chargor). That portion has been sold to all the interveners (particularly to interveners cited as defendants 2, 3, 4 and 6). Purchase price has been fully paid except that the final transfer was subject to approval on subdivision on the said land. Therefore the 1st defendant cannot, in law, charge the whole entire land in favour of the plaintiff;

(iv) the registration of the plaintiff's charge over the said land was made possible by an exchange of letters of consent from the interveners who had lodged their caveats on the said land, (whereby the interveners consented to the lodgment of the plaintiff's charge over their respective caveats) for the plaintiff's letter of undertaking/disclaimer dated 28 December 1995 (whereby the plaintiff, in return, categorically and unequivocally undertook to disclaim and exclude that portion of the land belonging to the interveners from any foreclosure proceedings and that their respective caveats would not be removed);

(v) the said charge document itself (Form 16A) was defective as the original typewritten figures "300/508.875" appearing in column 4 of the Schedule to the said Form 16A, were deleted and substituted with the word "semua" (handwritten) without the consent and knowledge of the chargor. The amendment was done and initialled by the solicitors acting for the plaintiff at that time;

(vi) the plaintiff has failed to comply with the requirements under O. 83 r. 3 of the RHC;

(vii) the plaintiff has committed fraud, dishonesty and misrepresentation in dealing with the matter particularly in how the charge was created; and

(viii) the interveners as well as the 1st defendant had sufficiently established "causes to the contrary" for the purpose of s. 256 of the NLC.

Applicable Laws

The plaintiff's application for an order for sale of the said land is made under s. 256 of the NLC which provides:

256. Application to Court for order for sale.

(1) This section applies to land held under:

(a) Registry title;

(b) the form of qualified title corresponding to Registry title; or

(c) subsidiary title,

and to the whole of any undivided share in, or any lease of, any such land.

(2) Any application for an order for sale under this Chapter by a chargee of any such land or lease shall be made to the Court in accordance with the provisions in that behalf of any law for the time being in force relating to civil procedure.

(3) On any such application, the Court shall order the sale of the land or lease to which the charge relates unless it is satisfied of the existence of cause to the contrary.

To put it in another way, the court shall not grant an order for sale if there is "cause to the contrary". What is "cause to the contrary"?

In *Low Lee Lian v. Ban Hin Lee Bank Bhd.* [1997] 1 MLJ 77, the Federal Court, held that:

(1) "cause to the contrary" within section 256(3) of the Code might be established only in three categories of cases: (i) when a chargor was able to bring his case within any of the exceptions to the indefeasibility doctrine in section 340 of the Code; (ii) when a chargor could demonstrate that the chargee had failed to meet the conditions precedent for the making of an application for an order for sale; and (iii) when a chargor could demonstrate that the grant of an order for sale could be contrary to some rule of law or equity. If no cause to the contrary could be shown, the Court would be obliged to make an order for sale.

In the same case *(Low Lee Lian; supra)* the Federal Court had also ruled that:

A judge hearing an application under section 256 of the Code must bear in mind that the procedure under the section is meant to be speedy and summary in nature. He is first concerned with whether the chargee has given the appropriate statutory notices as stipulated in the Code. Next, he must ensure that the procedural requirements prescribed by Order 83 of the Rules of the High Court 1980 have been complied with. Next, he is concerned with the very narrow question whether the material produced before him by the chargor constitutes cause to the contrary.

In the present proceedings there are six defendants contesting the application by the plaintiff for an order for sale of the said land. The 1st defendant is the chargor while the rest are interveners. In this context, it is trite law that the application for an order for sale can be defeated if any one of the six (6) defendants can satisfy the court of "cause to the contrary".

The exceptions to the indefeasibility doctrine are provided under s. 340(2) of the NLC, which reads as follows:

> (2) The title or interest of any such person or body shall not be indefeasible:
>
> (a) in any case of fraud or misrepresentation to which the person or body, or any agent of the person or body, was a party or privy; or
>
> (b) where registration was obtained by forgery, or by means of an insufficient or void instrument; or
>
> (c) where the title or interest was unlawfully acquired by the person or body in the purported exercise of any power or authority conferred by any written law.

Under s. 256(3) of the NLC, the onus is on the chargor or the interveners to show the existence of cause to the contrary, on the balance of probabilities. In doing so the chargor or the interveners may prove that the chargee himself is not free of fault and that he was guilty of unreasonable conduct. In *Overseas Union Bank Ltd. v. Lee Guat Cheow & Co. Sdn. Bhd.* [1987] 1 MLJ 51, Mohamed Dzaiddin J (now CJ) has ruled that:

> However, in the *Kheng Soon Finance* case it was held, *inter alia*, on an application for sale of the land charged the court has not only to apply the law but also to invoke the aid of equity in order to satisfy whether a cause to the contrary has been shown or not in accordance with section 256(3) of the National Land Code. The chargee must not only come to court with proof that the chargor has defaulted but also with proof that the chargee himself is free of fault and that he was not guilty of any unreasonable conduct, and that there was no right of innocent third parties to be affected by the Order.

His Lordship in that case, applied the above principle in dealing with the same issue. The same principle was also followed by Abdul Malek J in *Public Finance Bhd. v. Hock Seng Housing Development* [1991] 3 CLJ 2210; [1991] 3 CLJ (Rep) 496. In fact, in that case, His Lordship went a step ahead when he concluded that:

> This finding stands despite the fact that the chargee has priority over the purchasers by virtue of section 340 of the National Land Code.

Whether The Plaintiff Was Guilty Of Fraud Or Dishonesty In The Creation Of The Charge

In all their affidavits and submissions, all the defendants and the interveners tried to establish that the plaintiff, through their solicitors, Messrs Mohd. Azhar & Co. has committed fraud, dishonesty and misrepresentation in their efforts to get the 3rd party charge created by the 1st defendant in favour of the plaintiff.

It is not disputed that the 2nd, 4th and 6th defendants (interveners) had purchased their respective portions of the said land from the 1st defendant (chargor) and were in actual possession long before the plaintiff's charge was created on 26 December 1995. The purchase price was fully settled. They have expended large sums of money on improving the land in expectation of eventually receiving their individual titles when subdivision process is completed. They have also filed their respective private caveats on the said land in order to protect their interests. Then, some 2-3 years later, in 1995, the plaintiff being put to notice and aware of their interests, nevertheless, proceeded to approve a loan against the security of the said land. From the plaintiff's own affidavit, it is a fact that the plaintiff's interest was confined to only 300 acres of the said land. The security for the loan was to charge 300 acres of the said land. The charge document (Form 16A) in fact stated that only 300/508.875 acres of the said land was to be charged (see: column 4, p. 4 of the Schedule to Form 16A). However, this could not be done as it contravenes s. 241(1) of the NLC which does not permit a charge to be registered over a portion only until and unless the borrower is registered as a co-proprietor of such portion or until the land is subdivided.

The land has not been subdivided. Therefore the plaintiff cannot charge a portion of the said land (ie, 300/508.875 acres). The only alternative available was to get a 3rd party charge executed by the 1st defendant (as the registered proprietor of the said land) with the consent of the interveners who have lodged their respective private caveat on the said land at that time. There were some negotiations between the parties to resolve the matter. Finally the 1st defendant agreed to execute a 3rd party charge over the company's property in the said land and the three interveners (who had lodged their respective private caveat on the land) agreed to give consent that permitted the plaintiff to lodge a 3rd party charge on 300 acres of the said land, over their obstructive private caveats. This consent was given in return for a letter of undertaking/disclaimer from the plaintiff whose avowed intention was to exclude the interveners' shares in the said land from any eventual foreclosure proceeding that the plaintiff may initiate against the registered proprietor of the said land.

To facilitate the above arrangement, the Board of Directors of the 1st defendant has issued a resolution dated 26 December 1995 (duly signed by two directors) to authorise the creation of a 3rd party charge on "the company's property held under C.T. No. 1242 for Lot Nos: 19, 20, 31 and 33 Mukim Ulu Telam to secure the loan facility of Ringgit Malaysia Fifteen Million (RM15,000,000) only granted to Messrs. Jute Industries (M) Sdn. Bhd. and that the common seal of the company be affixed to all the relevant documents in connection with the aforesaid charge in the presence of any two (2) directors or a director and the secretary of the company." All the three interveners had also issued their respective letter of consent in return of a letter of undertaking/disclaimer dated 28 December 1995 issued by the plaintiff through their solicitors Messrs Mohd. Azhar & Co. in their favour. The said letter of undertaking/disclaimer is reproduced below:

Re: C.T. 1242 for Lot Nos. 19, 30, 31 & 33. Mukim Ulu Telam

We refer to the above matter.

We write to confirm that the private caveat lodged by yourselves *vide* presentation No. ... over the above piece of land at Pendaftar Hakmilik, Kuantan on 24th February 1992, has not been removed and will not be removed by the Bank Pertanian Malaysia, Tapah, Perak Darul Ridzuan.

We also hereby give our undertaking that Bank Pertanian Malaysia's interest will be confined to the 300 acres sold to M/s Jute Industries (M) Sdn. Bhd. and will exclude that portion of land belonging to yourselves from foreclosure proceeding in the event of any action being taken against the purchaser/ Borrower M/s Jute Industries (M) Sdn. Bhd. by Bank Pertanian Malaysia, Tapah, Perak Darul Ridzuan.

Thank you.

Yours faithfully,

(Sgd)

...

The relevant charge document was prepared by the same solicitors Messrs Mohd. Azhar & Co., who apparently was acting for both the chargee and the chargor. All the necessary copies were duly executed by affixing the common seal of the chargor and duly signed by two directors of the chargor namely: Visvanathan a/l Palaneyappah and Pannirvelvam a/l Subramaniam. One of the copies of the said Form 16A was kept by the 1st defendant (chargor). In column 4 of the Schedule to the said Form 16A under the heading: "Bahagian Tanah (jika ada)" – referring to the portion of the land to be charged, it was clearly typewritten – "300/508.875 bahagian". What it means is that the chargor

intended to charge only that portion of the land ie, 300/508.875 acres, not the whole entire land of 508.875 acres, held under C.T. 1242 Lot Nos: 19, 30, 31 & 33. (Of course as stated earlier, this cannot be done as it contravenes s. 241 of the NLC). The solicitors handling this matter should know about the legal restriction of this matter. Surprisingly, when the charge documents were presented for registration at the land office in Kuantan the next day ie, 27 December 1995, that particular column 4 in the Schedule was amended whereby the figures "300/508.875" were deleted and substituted handwritten with the word "semua". This amendment was made and initialled by the solicitors concerned without the knowledge and consent of the chargor (1st defendant) who had duly executed the document in its original form (without amendment) the day before (ie, 26 December 1995). A letter from Pejabat Pengarah Tanah dan Galian, Kuantan dated 23 August 1995 clearly confirmed the followings:

(a) Nama anakguam yang dinyatakan di dalam Borang 16A yang diserahkan ke pejabat ini pada 27.12.1995 ialah 'BLUE VALLEY PLANTATION BERHAD. Di dalam borang tersebut terdapat perkataan "Sdn." sebelum perkataan berhad yang telah dipotong oleh Peguambela dan Peguamcara yang membuat penyaksian.

(b) Bahagian tanah yang dicagar seperti yang tercatit di mukasurat 4 Borang 16A ialah semua bahagian. Walau bagaimanapun angka 300/508.875 telah dipotong dan ditandatangani oleh Peguambela dan Peguamcara yang membuat penyaksian.

(c) Sijil Kebenaran dari Lembaga Tanah Ladang tidak dikemukakan dengan instrument bagi pendaftaran di bawah Bahagian 18 Kanun Tanah Negara 1965.

The said amendment was made by the solicitors without any prior knowledge and consent of the 1st defendant as chargor. In paras. 9 and 11 of the 1st defendant's affidavit-in-reply (encl. 25) a director of the 1st defendant stated that:

9. Gadaian yang kemudian didaftarkan adalah di atas keseluruhan tanah yang tidak pernah dipersetujui kerana defendan pada masa material tersebut tidak memiliki dengan sepenuhnya hak bagi semua 508.875 ekar tanah tersebut dan Plaintif mempunyai pengetahuan/notis mengenai kepentingan pihak ketiga yang lain yang telah membeli bahagian-bahagian tanah terdahulu daripada Defendan sebelum tanah tersebut digadai kepada Plaintif.

11. Plaintif telah mengetahui akan kepentingan pihak-pihak ketiga yang jelas dieksibitkan surat kebenaran oleh pemegang kaveat yang merupakan pihak ketiga yang berkepentingan. Surat kebenaran dikepilkan dengan gadaian yang dimasukkan untuk pendaftaran oleh Plaintif.

None of the interveners who had given their consent earlier, knew about the amendment made by the solicitors. Obviously, the amendment was contrary to what they have agreed earlier that the charge was only to cover 300 acres of the land, but not the entire 508.875 acres.

On this premise, the court share the same view with the 1st defendant and the interveners that on the evidence available, the solicitors concerned has gone beyond the authority given to him to register the charge document. The main function of the solicitors in this matter is to see that the charge documents were properly and correctly filed and signed by the chargor and the chargee respectively. It is also the duty of the solicitors to ensure that the signatories to the charge documents were duly authorised by the chargor and the chargee to execute the documents. But, such duties conferred on the solicitors in this matter do not include power or duty to make any amendment to the charge documents which might affect the interest of the parties without having obtained the necessary consent from the parties concerned. In the present case, the amendment made by the solicitors in the charge document is very vital. It struck adversely on the interest of the chargor and the interveners who have caveated the land. On the other hand, it brings happiness and advantages to the chargee (the plaintiff). This action on the part of the solicitors may amount to fraud, dishonesty or misrepresentation. As a matter of fact, the solicitors knew about the interest of the interveners. He knew that the interveners were in actual possession of their respective portion of the land. He also knew that the 1st defendant did not beneficially own the entire land; that the plaintiff's interest in the said land confined only to 300 acres, not the whole entire land; that a charge on an undivided portion of the land is prohibited by virtue of s. 241 of the NLC. He managed to convince the interveners (the caveators) to give their consent for a 3rd party charge be created in favour of the plaintiff over the said land in return for a letter of undertaking/disclaimer issued to please the interveners. He prepared the relevant Form 16A stating that the land to be charged was only "300/508.875 acres" and get the form duly executed by the 1st defendant and signed by its directors. Yet on the next day, ie, 27 December 1999 when the charge documents were presented for registration at the land office in Kuantan, he made the amendment, without the prior knowledge and consent of the chargor and the interveners. These series of transactions amount to fraud, dishonesty and misrepresentation on the part of the plaintiff through their solicitors. The fact that the plaintiff now, by making the present application (encl. 2) for an order for sale in respect of the whole entire land, and by not disclosing the interest of the interveners in their affidavit-in-support of the application (encl. 4), clearly confirmed the above finding about the said fraud, dishonesty and misrepresentation.

It is well-settled law that while s. 340(1) of the NLC makes it abundantly clear that the title or interest of a registered proprietor, which include a chargee, shall be indefeasible, such title or interest shall not be indefeasible by reason of sub-s. (2) of s. 340 of the Code in a case of actual fraud. (See: The Federal Court decision in *Tai Lee Finance Co. Sdn. Bhd. v. Official Assignee & Ors* [1983] 1 CLJ 183; [1983] CLJ (Rep) 387). In *Assets Company Ltd. v. Mere Roilmi* [1905] AC 176, Gerahty J held that:

> Fraud in actions seeking to affect a registered title means actual fraud, dishonesty of some sort.

In another case, *P.J.T.V Denson (M) Sdn. Bhd. & Ors v. Roxy (Malaysia) Sdn. Bhd.* [1980] 2 MLJ 136, Raja Azlan Shah CJ Malaya (as His Majesty then was) at p. 138 emphasised that:

> Whether fraud exists is a question of fact, to be decided upon the circumstances of each particular case. Decided cases are only illustrative of fraud. Fraud must mean "actual fraud, ie, dishonesty of some sort" for which the registered proprietor is party or privy. "Fraud is the same in all courts, but such expressions as "constructive fraud" are ... inaccurate; but "fraud" ... implies a wilful act, on the part of one, whereby another is sought to be deprived, by unjustifiable means, of what he is entitled." (per Romilly M.R. in *Green v. Nixon*). This in *Waimiha Sawmilling Co. Ltd. v. Waione Timber Co. Ltd.* it was said that 'if the designed object of a transfer be to cheat a man of a known existing right, that is fraudulent.

In *Tai Lee Finance Co. Sdn. Bhd. v. Official Assignee & Ors* [1983] 1 CLJ 183; [1983] CLJ (Rep) 387, the Federal Court held that the fraud envisaged by s. 340 of the NLC must be that which resulted in registration and that it must have been committed prior to or at the time of registration of the charge.

In our present case, there are evidence to show that the plaintiff, through their solicitors was dishonest and therefore fraudulent in getting the 3rd party charge executed by the 1st defendant. The fraud and dishonesty was committed prior to as well as at the time of registration of the charge.

Misrepresentation

Apart from fraud, s. 340(2)(a) of the NLC also provides that a registered title or interest may be set aside on the ground of misrepresentation to which the person or body is a party or privy. "Misrepresentation" here would appear to be "fraudulent misrepresentation and a species of fraud". (See: *Loke Yew v. Port Swettenham Rubber Co. Ltd.* [1913] AC 491 (Privy Council); and *Datuk Jaginder Singh & Ors v. Tara Rajaratnam* [1983] 2 MLJ 196 (Federal Court). The word "or" appearing after the word "fraud" in para. (a) of s. 340(2) of

the NLC would appear to have a disjunctive effect and hence what needs to be proved is either actual fraud or fraudulent misrepresentation or even both. (See: *Datuk Jaginder Singh & Ors v. Tara Rajaratnam, supra*).

In our present case, the plaintiff through their solicitors has fraudulently misrepresented the fact in the charge documents (Form 16A) that the charge was to cover the whole entire land, not merely 300/508.875 acres as intended by the chargor. In actual fact, as originally stated in the said Form 16A which was duly executed by the 1st defendant (the chargor) and agreed by the interveners (caveators) based on the letter of undertaking/disclaimer of the plaintiff itself, the area of the land to be charged is only 300/508.875 acres. The amendment was made and initialled by the solicitors without any knowledge and consent of the chargor and the caveators.

The plaintiff is saying that their then solicitors amended the charge document (Form 16A) upon presentation for registration at the land office, without informing and referring back to the 1st defendant (as chargor), was based on the authority given by the 1st defendant *vide* Board of Directors Resolution dated 26 December 1995, and the consent letters issued by the interveners (caveators). With respect, under the circumstances of the case, the said assertion by the plaintiff is unsustainable and cannot be accepted by the court. In the first place the same solicitors who was acting for the plaintiff (chargee) was also acting for the 1st defendant (chargor) in the registration of the charge. He knew the background of the matter. He knew the intention of the caveators and the chargor to charge only 300/508.875 acres of the land, not the whole entire land. He also knew that the land was also subject to some interest of the interveners who were already in actual possession of their respective portions. He was fully aware that the 1st defendant did not beneficially own substantial portion of the land which was sold to the interveners, and as solicitor, he should be aware that the 1st defendant (as a chargor) cannot in law create a charge over the whole land which includes the portion which was not beneficially owned by the 1st defendant at that time. (See: *Overseas Chinese Banking Corporation Ltd. v. Lee Tan Hwa & Anor (Goh Ah Chee & Anor, Interveners)* [1989] 1 CLJ 458; [1989] 2 CLJ (Rep) 198).

It is very unreasonable and unsustainable for the solicitor to say that under the circumstances, he was authorised by the resolution to affect the vital amendment as what he did when the charge documents were presented for registration. The solicitors must also realise that the said resolution among other things, resolved that "the common seal of the company be affixed to all the relevant documents in connection with the aforesaid charge in the presence of any two (2) directors or a director and the secretary of the company". The charge documents were duly executed on behalf of the 1st defendant in

accordance with the said resolution when they were first forwarded for execution by the 1st defendant on 26 December 1995. So, when amendment has to be made to the charge documents for the purpose of registration of the charge and when the nature of the amendment is very vital (as in the present case), the amendment can only be made by the same authority which originally executed the documents based on the authority of the resolution ie, "to affix the common seal of the company in the presence of any two (2) directors or a director and the secretary of the company." There is nothing in the said resolution which can be interpreted as giving the solicitors the authority to affect the amendment to the charge documents without the consent of the 1st defendant.

Standard Of Proof Required To Prove Fraud Or Fraudulent Misrepresentation

The plaintiff submitted that the standard of proof required to prove fraud or fraudulent misrepresentation in the present proceeding is on "beyond reasonable doubt". This stringent test was set in *Tai Lee Finance Co. Sdn. Bhd. v. Official Assignee & Ors (supra)* and *Low Lee Lian v. Ban Hin Lee Bank Bhd. (supra)*. However, the whole issue of standard of proof required to prove fraud, fraudulent misrepresentation as well as forgery, in civil cases (including the present proceeding) has now been resolved whereby the Federal Court in the case of *Adorna Properties Sdn. Bhd. v. Boonsom Boonyanit* [2001] 2 CLJ 133 held that the standard of proof required to prove forgery in civil cases is one on a balance of probabilities. Even though in that case, the Federal Court was dealing with the issue of "forgery" in civil cases, there is no reason why the same principle cannot be applicable to "fraud or fraudulent misrepresentation" in civil cases. This court is of the opinion that the same principle would also be applicable to the present case where the 1st defendant as well as all the interveners have to prove that the plaintiff, through their solicitors has committed fraud or fraudulent misrepresentation in getting the 3rd party charge registered in their favour. In that case *(Adorna Properties)*, Eusoff Chin Chief Justice (as he then was) has ruled that:

> Before us, two questions of law were posed for decision and the first is:
>
> (1) For proof of forgery, such as the one under appeal, whether the standard of proof is on a balance of probabilities or beyond reasonable doubt? The same arguments which the parties had put before both the High Court and the Court of Appeal were again argued before us. The High Court held that forgery must be proved beyond reasonable doubt, which the Court of Appeal held that it should be on a balance of probabilities. For the reasons given by the Court of Appeal – see [1997] 3 CLJ 17, we entirely agree that the standard of proof required to prove 'forgery' in civil cases is one on a balance of probabilities.

Applying the above principle to the fact of the present case, this court is fully satisfied that, based on all the affidavits filed by all the parties and their respective submissions, on the balance of probabilities, the defendants has proved that the plaintiff, through their solicitors has committed fraud and fraudulent misrepresentation in getting the 3rd party charge created and registered in favour of the plaintiff.

The Letter Of Undertaking/Disclaimer By The Plaintiff

In respect of the letter of undertaking/disclaimer dated 28 December 1995 issued by Messrs Mohd. Azhar & Co., who was acting for the plaintiff in the whole exercise to create the 3rd party charge, the plaintiff's counsel argued that the said letter was not relevant to the present proceeding and further claimed that the said letter was not issued by the plaintiff *per se*. It was issued by Messrs Mohd. Azhar & Co., which was printed on the letterhead of Messrs Mohd. Azhar & Co. without any evidence that a copy has been issued to the plaintiff. What the plaintiff is saying is that the said letter of undertaking/disclaimer was not issued by the plaintiff or under the plaintiff's instruction and therefore not binding on the plaintiff. Again, the court is of the view that this submission by the plaintiff is very unreasonable and unsustainable. The knowledge and action of the solicitors who was acting for the plaintiff must be imputed to the plaintiff. The plaintiff cannot disclaim such action just because a copy of the said letter of undertaking/disclaimer was not given to the plaintiff by the solicitors. In *Overseas Chinese Banking Corporation Ltd. v. Lee Tan Hwa & Anor (Goh Ah Chee & Anor, Interveners)* [1989] 1 CLJ 458; [1989] 2 CLJ (Rep) 198 Eusoff Chin J (as he then was) supported the proposition that the knowledge of the solicitors acting for a party must be imputed to him (the said party).

Void Instrument Of Charge

Under s. 340(2)(b) of the NLC registration which is obtained by way of an insufficient or void instrument does not confer indefeasibility on the title or interest acquired. The phrase "insufficient or void instrument" has not been judicially defined and in most cases, the courts have not attempted to distinguish the words "insufficient" and "void". The better view is that the phrase should be read disjunctively. Hence, for instance, an instrument of dealing may be considered to be insufficient for failure to comply with certain procedures or formalities as laid down by the Code. On the other hand, a void instrument would however, include one which is forged or obtained by way of fraud or fraudulent misrepresentation (as in the present case), or which is contrary to any restriction in interest to which the land is subject or to any prohibition imposed by the Code or written law.

In the present case, the court is satisfied that the relevant charge documents (Form 16A) which was created and registered by way of fraud and fraudulent misrepresentation by the plaintiff's solicitors can be considered as a void document. Therefore the resulting charge is caught under s. 340(2)(b) of the NLC. This finding is further supported by the submissions made by the plaintiff's counsel in another case *vide* Ipoh High Court, Saman Pemula No. 243-448-2000 involving an application by the purchasers (interveners in the present case) to subdivide the same piece of land which is the subject matter in the present case. In that case the plaintiff in the present case is cited as an intervener together with 23 others (who are also interveners in the present case). The plaintiff has engaged the same counsel for both the present case as well as the other case in Ipoh High Court. From the records of proceedings in that other case, which are exhibited in the 1st defendant's affidavit (encl. 57) in the present case, the plaintiff's counsel had on 7 January 2002, informed the court in Ipoh the following:

> Basically the bank agrees that they will allow a discharge of the charge over the 300 acres and accept a fresh charge over the 300 acres which it is claiming upon receipt of the subdivided title. At time of the charge the bank was aware that some portions of the land had been sold in undivided shares to third party.

Aid Of Equity

In dealing with the present application for an order for sale by the plaintiff, the court must not only apply the law but must also invoke the aid of equity in order to satisfy whether cause to the contrary has been shown or not in accordance with s. 256(3) of the NLC. There are a number of leading authorities on this issue. In *Low Lee Lian v. Ban Hin Lee Bank Ltd. (supra)*, the Federal Court has rules, *inter alia*, that "cause to the contrary" within s. 256(3) of the NLC might be established when a chargor could demonstrate that the grant of an order for sale could be contrary to some rule of law or equity. In *Kheng Soon Finance Bhd. v. M.K. Retnam Holding Sdn. Bhd.* [1983] 2 MLJ 384, the Federal Court held that:

> On an application for sale of the land charged the Court has not only to apply the law but also to invoke the aid of equity in order to be satisfied whether a cause to the contrary has been shown or not in accordance with section 256(3) of the National Land Code.

This part of the Federal Court decision in that case was not disturbed by the Privy Council when the case was brought before them as reported in [1989] MLJ 457. The Privy Council in their decision, recognised the fact that the phrase "cause to the contrary" as provided in s. 256(3) of the NLC, has been construed in Malaysia as justifying the withholding of an order for sale where

to make one could be contrary to some rule of law or equity. The same principle was adopted and followed in *Overseas Union Bank Ltd. v. Lee Guan Cheow & Co. Sdn. Bhd. (supra)*; and *Public Finance Bhd. v. Hock Seng Housing Development (supra).*

That being the case, the chargee (the plaintiff) must not only come to court with proof that the chargor has defaulted, but also with proof that the chargee himself is free of fault and that he was not guilty of any unreasonable conduct. There must also be proof that there was no right of innocent third parties to be affected by the order for sale.

Having equitable flavour, the chargee who applies for an order for sale must come with clean hands. The chargee must provide full and frank disclosure of all the material facts in his application as well as his affidavit in support. It is obvious in the present application that the plaintiff (as chargee) has failed to disclose all the material facts in their application and affidavit in support to enable the court to properly consider the merit of the application. Despite the plaintiff knowing fully well the interest of the interveners before the creation of the charge and also the fact that the chargor did not beneficially owned the whole land in question when the charge was created, they yet applied to the court (*vide* encl. 2) to obtain an order for sale for the whole entire land, including the portions of the innocent interveners. There is no mention in the plaintiff's affidavit about the interveners' interest in the said land; about the interveners as purchasers of their respective portions of the land being in actual possession of the land prior to the creation of the charge; and about the detailed transactions as to how the 3rd party charge was created and registered. All information and facts were already in the plaintiff's knowledge prior to or at the time when the charge was created. The plaintiff is guilty of not only concealing material facts but also fraudulently and dishonestly misrepresenting facts to this court. The plaintiff has failed to provide full picture of the transactions between them. On the contrary a completely different and "innocent" factual matrix was presented in their affidavit in support to this court to obtain an order for sale of the land in question. This court would have been misled into granting an order for sale had not those interveners intervened to place all the relevant and material facts before the court.

The fact that the plaintiff knew about the interveners, who are *bona fide* purchasers of their respective portions of the said land, and have been in actual possession in the land, makes it material for same to be disclosed by the plaintiff in their application for an order for sale, not only in equity but also because it was specifically provided by law. In the present application (encl. 2, prayer (a)) the plaintiff applies for an order for sale of the whole of 508.875 acres of the land held under C.T. No. 1242, Lot Nos: 19, 30, 31 and 33,

while in prayer (h) of encl. 2, the plaintiff seeks from the 1st defendant to give vacant possession of the said land within seven days from the date of the auction. That being the case, the plaintiff must comply with the relevant provisions of O. 83 r. 3 of the RHC 1980, which provides as follows:

> 3(1). The affidavit in support of Originating Summons by which an action to which this rule applies is begun must comply with the following provisions of this rule.
>
> This rule applies to a charge action begun by originating summons in which the Plaintiff is the chargee and claims delivery of possession or payment of money secured by the charge or both.

Order 83 r. 3(3) further provides, *inter alia*, that where the plaintiff claims delivery of possession the affidavit must show the circumstances under which the right to possession arises. Order 83 r. 3(4) also specifically provides that where the plaintiff claims delivery of possession, the affidavit must give particulars of every person who to the best of plaintiff's knowledge is in possession of the charged property.

In the present application, it is very obvious that the plaintiff has failed to comply with these requirements. Such failure is not a mere technical irregularity which can be cured. It goes to the very basic substance for consideration by the court in order not to prejudice the interest of the other innocent persons who have been legally in occupation of the said land. This has been stressed by the Federal Court in *Low Lee Lian v. Ban Hin Lee Bank Bhd. (supra)* when it was ruled that "a judge hearing an application under s. 256 of the NLC must ensure that the procedural requirements prescribed by O. 83 of the RHC have been complied with". The Federal Court has also ruled, in that case, that only after those requirements have been complied with, the court can be concerned with the very narrow question whether the material produced before him by the chargor constitute cause to the contrary. In other words the plaintiff must comply with the relevant requirements under O. 83 r. 3 of the RHC. It is mandatory. Failure to do so will enable the court to dismiss the application for an order for sale even without considering the issue relating to cause to the contrary. So in the present case, the plaintiff's application *vide* encl. 2, can and shall be dismissed with costs, just on this ground alone.

For the purpose of completeness, I shall proceed to consider the other equitable issues in the present case, in order to strengthen the finding that there are more than sufficient "cause to the contrary" established by the interveners as envisaged under s. 256(3) of the NLC.

Whether The 1st Defendant (As Chargor) Can Charge The Whole Entire Land In Favour Of The Plaintiff

The plaintiff relied heavily on the strength of the 1st defendant's Board of Directors Resolution dated 26 December 1995, to justify the registration of the 3rd party charge on the whole entire land in their favour. The said resolution resolved that the "company's property held under C.T. No. 1242 for Lot Nos. 19, 20, 31 and 33, Mukim Ulu Telom to be charged to secure the loan facility granted to Messrs Jute Industries (M) Sdn. Bhd." The question is whether the "company's property" owned beneficially by the 1st defendant comprised of the whole entire land or was just confined to the portion which has not been sold to the other purchasers (the interveners). It is not disputed that the interveners have purchased their respective portions of the said land and they were in actual possession even before the 3rd party charge was created. The purchase price have been fully settled. Some of the interveners have lodged their respective private caveats on the said land before the charge was created. It is not disputed that the plaintiff knew about this fact. These interveners having paid full purchase price and being in possession of their respective portions of the said land, have become the beneficial and equitable owners of their portions. The 1st defendant is just a mere trustee. This principle was clearly established by the Federal Court in the case of *Temenggong Securities Ltd. & Anor v. Registrar of Titles, Johore and Ors* [1974] 2 MLJ 45, where it was held that:

> the vendors having parted with their interest in the lands to the appellants were bare trustees and had no interest in the land over which a valid caveat could be lodged.

Ong Hock Sim FJ at p. 46 stated that:

> In our view there can be no doubt as to the position in law. As was said by Jessel M.R. in *Lysaght v. Edwards:*
>
> > ... the effect of a contract for sale has been settled for more than two centuries; certainly it was completely settled before the time Lord Hardwicke, who speaks of the settled doctrine of the Court as to it. What is that doctrine? It is that the moment you have a valid contract for sale the vendor becomes in equity a trustee for the purchaser of the estate sold, and beneficial ownership passes to the purchaser, the vendor having a right to the purchase money, a charge or *lien* on the estate for the security of that purchase money, and a right to retain possession of the estate until the purchase money is paid, in the absence of express contract as to the time of delivering possession.

In the present case, the 1st defendant at the time when the charge was created was just a mere bare trustee and no longer the actual beneficial owner of the portions of the land purchased by the interveners. Therefore the 1st defendant could not charge the whole entire land in favour of the plaintiff. The most the 1st defendant can do is to charge the 300 acres portion which was not sold to any purchaser at that time, but not the whole entire land. The 1st defendant has no power in law to do so. Therefore the court cannot authorise the 1st defendant to do something which he could not do in law. In this respect, the Federal Court in *Public Finance Bhd. v. Narayanasamy* [1971] 2 MLJ 32, held that:

> In that event, should the Respondent, nevertheless, be unable or unwilling to repay the debt, can the Appellants in good conscience apply to the Court for an order of sale to include property over which the Respondent, to their knowledge, has no power of disposal? What the Respondent himself cannot lawfully do, the Court cannot authorise to be done, if the result would be to condone or enable a fraud on third parties.

In the present case, the 1st defendant had, in their affidavit-in-reply (encl. 25) at para. 9, in fact admitted that they have never consented to the creation of the charge over the whole entire land because at all material times, they were not the beneficial owner of the whole entire land. Certain portions of the said land have been sold to the interveners. In the premise, the charge created in favour of the plaintiff over the whole entire land cannot be held to be valid since a substantial portion of the land was not absolutely owned by the 1st defendant and consequently an order for sale could not be granted. In *Overseas Chinese Banking Corporation Ltd. v. Lee Tan Hwa & Anor (Goh Ah Chwee & Anor, Interveners) (supra)*, it was clearly held that:

> (3) the charge of the whole land to the Plaintiff could not be a valid charge since a substantial portion of it was not absolutely owned by the Defendant.
>
> (4) Now that the first intervener had completed the purchase and had gone into possession of his share of the land, it would not be justified and would be plainly unconscionable to deprive him of what he had bought by holding that the charge was valid when in fact it was void.

Prayer (h) of encl. 2 seeks an order for the 1st defendant (chargor) to give vacant possession of the entire said land within (7) days from the date of the auction. As has been stated earlier, the interveners are innocent *bona fide* beneficial and equitable owners of their respective portions of the said land, purchased by them for valuable consideration having paid their full purchase prices and who were in actual possession of their portions purchased. The 1st defendant is not in possession of the portions of the land purchased by the

interveners. In fact the 1st defendant has given possession to the interveners of the portions purchased by them. The 1st defendant has parted with possession of the said portions. Therefore, if the plaintiff's application in prayer (h) of encl. 2 is granted by the court, the 1st defendant cannot humanly and possibly give vacant possession of the said portions purchased and occupied by the interveners. This court will not do anything in vain or in futility. On the assumption the court makes an order in terms of prayer (h) of encl. 2, such an order cannot be complied with by the 1st defendant. There is no prayer in encl. 2 for the interveners to give vacant possession. Of course, there cannot be such a prayer sought by the plaintiff against the interveners. The order for sale under s. 256 of the NLC is a statutory remedy which the plaintiff (as chargee) can only seek against the defendant (as chargor) and not against anyone else, least against the interveners.

No Caveat Lodged By The 3rd Defendant

The plaintiff's counsel submitted that the plaintiff was aware of 2nd, 4th and 6th defendants' interest in the said land by way of the caveats that were respectively filed by them prior to the registration of the plaintiff's 3rd party charge. However, the plaintiff was not aware of any alleged interest of the 3rd defendant in the said land prior to the registration of the charge. The 3rd defendant has admitted that his private caveat on the said land was only filed after the registration of the plaintiff's 3rd party charge. The plaintiff argued that since the 3rd defendant has neglected to file a caveat prior to the registration of the plaintiff's 3rd party charge, therefore the plaintiff is not bound in any manner whatsoever by any such alleged interest.

It is not disputed that the 3rd defendant had purchased his portion of the land and was in actual possession of the said portion long before the creation of the charge, except that he has not lodged any caveat on the said land as what has been done by the 2nd, 4th and 6th defendants.

It is true that a purchaser of land under an agreement has to protect his interest by filing a caveat on the said land. (See: *Haroon bin Guriaman v. Nik Mah bte. Nik Mat & Anor* [1951] MLJ 209). A caveat, in layman language, is a reminder lodged by a person (known as caveator) at the land office in respect of a land, informing the world that the caveator has an interest in the said land and he needs to be notified of any dealing on the said land. It is a type of a reminder to the world, based on a pre-existing right or interest of the caveator on the said land. If a person who had purchased the land or has any other interest on the land fails to lodge a caveat, the result is that he may not be notified of any subsequent dealings on the land and his right or interest in the land is not protected and shall be subject to the subsequent dealings. However, such failure to lodge a caveat does not mean that his existing right

or interest in the said land shall be nullified. In case the land is being charged and later subject to a foreclosure proceeding by the chargee, he may apply to the court to intervene and the court may consider his right or interest in the land before making any order for sale, notwithstanding that there was no caveat lodged by him on the said land. The court may not grant an order for sale for the said land if it is satisfied that, by a mere existence of his right and interest in the said land, cause to the contrary has been established. This is what happened in *Overseas Chinese Banking Corporation Ltd. v. Lee Tan Hwa & Anor (Goh Ah Chwee & Anor, Interveners) (supra),* where the court dismissed the chargee's application for an order for sale, after the interveners established cause to the contrary being purchasers of the said land, notwithstanding that they have not lodged any caveat on the said land.

In his book, *"The Torrens System in Malaya"* the writer S.K. Das at p. 327, has said:

> The provision for lodging a caveat is for the very purpose of enabling parties to protect interest which, owing to a defect in the instrument or want of form or otherwise, they cannot protect by the ordinary process of registration. A caveat is a temporary impediment to registration of dealing and is not necessarily a blot on the title. The whole system of caveat is founded on the principle that they exist for the protection of alleged as well as proved interests and of interests that have not become actual interests in land. The caveator's claim is neither increased nor diminished by the lodgment of caveat. It is a remedy ancillary to such other proceedings as may be proper for disposing of the question in dispute.

The same proposition was also held by Buhagiar J in the case of *Chin Cheng Hong v. Hameed & Ors* [1954] MLJ 169 when he said:

> The whole system of caveats is founded on the principle that they exist for the protection of alleged as well as proved interests and of interests that have not yet become actual interests in lands, but a caveat, being in the nature of statutory injunction, does not in itself make a claim or right either better or worse.

In *Wu Shu Chen & Anor v. Raja Zainal Abidin Raja Hussin* [1997] 3 CLJ 854, Mokhtar Sidin JCA has said:

> By itself a private caveat is not a remedy, and it does not create an interest in land.

In the present case, the 3rd defendant did not lodge any caveat prior to the creation of the plaintiff's 3rd party charge. They lodged their caveat only after the charge was created and registered. So by virtue of s. 340 of the NLC the plaintiff as a chargee, has priority over the 3rd defendant's interest in the said

land. However, it does not mean that the 3rd defendant is precluded from establishing cause to the contrary in order to defeat the plaintiff's application for an order for sale of the said land. The 3rd defendant is at a liberty to prove to the court that the plaintiff himself was guilty of an unreasonable conduct and that their rights as innocent purchasers would be adversely affected by the order. This proposition has been made clear by Abdul Malek J in *Public Finance Bhd. v. Hock Seng Housing Development (supra),* when he held that in an application for sale of land charged, the chargee must come to court with proof that he is free of fault and that he was not guilty of any unreasonable conduct, and that there was no right of innocent third parties to be affected by the order. His Lordship also stressed that: "This finding stands despite the fact that the chargee has priority over the purchasers by virtue of s. 340 of the National Land Code."

On those authorities cited above, the court is satisfied that the 3rd defendant has also established cause to the contrary to defeat the plaintiff's present application, notwithstanding he has not filed a caveat before the creation of the plaintiff's 3rd party charge. The plaintiff knew about the 3rd defendant's interest in the land as they were already in actual possession of their portion of the land 2-3 years before the charge was created.

Balance Of Justice

In an application for sale of land charged the court has not only to apply the law but also to invoke the aid of equity in order to be satisfied whether a cause to the contrary has been established or not. Therefore, in the present case, the court is of the view that it is not inappropriate, to consider the balance of justice ie, where justice lies if an order for sale is granted or otherwise.

If an order for sale is granted as prayed by the plaintiff *vide* encl. 2, the whole entire land (including those portions purchased by all the interveners) will be auctioned and obviously, all the interveners will suffer great losses, perhaps irreparable, since they have paid the purchase prices and were in actual possession of their respective portions cultivating tea. They have spent big sum of money to cultivate and to improve their land. They have completed their purchase. It would not be justified and would be plainly unconscionable to deprive them of their rights and interest on the said land. They have nothing to do with the loan facility granted to Jute Industries (M) Sdn. Bhd. They have not benefited a single sen from the said loan facility. The plaintiff cannot be allowed to ride roughshod over the innocent interveners who eke out an honest living from their portions which they have levelled, improved and cultivated by expanding very substantial sums of money and effort. An order for sale is

made only if it is fair and just in all the facts and circumstances of the case. It cannot be just if the right and interest of the innocent interveners are made to lose their lands.

On the other hand, if an order for sale is refused, the plaintiff is not going to be out of pocket by the sum of RM22 million claimed in respect of the loan facility granted to Jute Industries (M) Sdn. Bhd. On the authority of *Kandiah Peter a/l Kandiah v. Public Bank Bhd.* [1993] 4 CLJ 332, the question of *res judicata,* or cause of action estoppel, or issue estoppel are not applicable to foreclosure proceedings as proceedings to foreclose under s. 256 of the NLC merely enforce the right of the chargee by exercising his statutory remedy against the chargor in default; the court hearing such an application for foreclosure does not make any adjudication upon any substantive issues. Therefore the plaintiff can refile its foreclosure action. Furthermore, an application to subdivide and partition the said land is pending in Ipoh High Court *vide* Saman Pemula No. 24-448-2000 involving the same parties as in the present proceeding. The plaintiff in this present proceeding is named as an intervener in the Ipoh case. In fact from the notes of proceedings in the Ipoh case, it was recorded that the plaintiff's counsel had informed the court that "basically the bank (plaintiff in this case) agrees that they will allow a discharge of the charge over the 300 acres and accept a fresh charge over the 300 acres which it is claiming upon receipt of the subdivided title. At the time of the charge the bank was aware that some portions of the land had been sold in undivided shares to third party."

The plaintiff can always have a second bite at the cherry if their application to subdivide and partition the said land is granted by the Ipoh High Court. In any event, if the plaintiff is courageous enough to acknowledge the propriety rights of all the interveners in the present proceeding, the lost ground in the Kuantan proceeding can be rectified in their favour in the Ipoh proceeding. Therefore, in any event, the plaintiff is not going to be out of pocket by the current outstanding loan sum. There are avenues for recovery. However, those existing avenues for recovery should not be launched at the expense and on the back of innocent interveners.

In the circumstances, the court is fully satisfied that the balance of justice lies in favour of the interveners ie, that an order for sale of the said land as prayed by the plaintiff should not be granted.

Conclusion

Under the circumstances and based on the above grounds, the court is fully satisfied that all the defendants (including the interveners) have raised numerous causes to the contrary in order to defeat the plaintiff's application for an order for sale of the said land under s. 256(3) of the NLC *vide* encl. 2. The plaintiff has also failed to comply the mandatory requirements under O. 83 r. 3 of the RHC 1980 in respect of this application. Therefore, the court has no other alternative than to dismiss the plaintiff's application with costs to be paid to all the defendants.